

Message

From: Hurlid, Kathy [Hurlid.Kathy@epa.gov]
Sent: 11/30/2020 8:09:20 PM
To: Hicks, Matt [Hicks.Matthew@epa.gov]
Subject: FW: Draft 404(g) preamble sections for review: upfront and background - Mindy questions for you re Rose's draft

From: Hurlid, Kathy
Sent: Thursday, July 30, 2020 10:23 AM
To: Chemerys, Ruth <Chemerys.Ruth@epa.gov>
Subject: RE: Draft 404(g) preamble sections for review: upfront and background - Mindy questions for you re Rose's draft

From the October 1978 legislative history of the 95th Congress 2nd session, 3 simply talks

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

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I did some crafting of language, it is not all quotes. Use what you think is best. - Kathy

volume 4. Serial No 95-14, 869-870, says:

"There has been considerable discussion of the provisions of section 404 of the act, much of which has been related to the suspicions and fears with respect to that section, and little of which has been related to substantive solutions to real problems while providing an adequate regulatory effort to assure some degree of wetlands protection. There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principle source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve. The upland farming, forestry and normal development activity carried primarily by individually and as a part of family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters. At the same time, these activities cannot be fully ignored. Without question, they should not and cannot be regulated by the Federal Government. Equally without question, there should be a degree of discipline over the extent to which those activities destroy wetlands or pollute navigable waters. The committee bill addresses these questions and tries to deal both with the institutional method for reducing the impacts of this program and also maintain a program of effective wetlands protection.

Section 208, of the 1972 act's laboratory for new institutional control mechanisms for vexing nonpoint source problems, is undoubtedly the logical element for dealing with this and other similar problems. It may not be adequate. It may be that the States will be reluctant to develop the control measures and management practices which protect upland wetlands and navigable waters, and it may be that sometime in the future a Federal presence can be justified and afforded.

But for the moment, it is both necessary and appropriate to make a distinction as to the kinds of activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control.

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

S. Bill 1952, in section (I)(5) allowed states to assume primary responsibility for implementing the permit program outside the USACE program in the co-called phase I waters.: The assumption procedures were modeled on the 402 procedures for transfer of the NPDES authority to the states in the hopes that the familiar process would expedited state adoption of the program.

Pages 897 –

“Mr. President, one of the most difficult and controversial issues is that relating to the regulation of the disposal into the waters of dredged and fill material. This issue was extensively debated last year and again earlier this year. **[Sec. 49: Sec. 404, 402, 208 FWPCA]**

The situation arose from judicial and administrative interpretation of the provisions of **section 404** of the Water Pollution Control Act of 1972. These actions greatly expand the authority of the Army Corps of Engineers to regulate the placement of dredged and widespread concern that many activities that are normally considered routine would be prohibited or made extremely difficult because of the complex regulatory procedure.

Last year, in developing the water pollution bill, Senator Baker and I sponsored a provision to give congressional direction to the regulatory program now carried out solely by the Corps of Engineers. This proposal was adopted by the committee and by the Senate. Unfortunately, however, the conference on the water pollution bill was not concluded before the end of the 94th Congress.

The Committee on Environment and Public Works has, therefore, approached this problem again and has devised a realistic and workable way of protecting our Nation’s waterways from contamination by the disposal of dredged and fill materials. The section of the Clean Water Act of 1977 addressing this subject is similar to that in last year’s bill.

The committee bill recognizes that there should be no gaps in the effort to protect our Nation’s waterways from contamination. For that reason, a broad program of control is provided and permits for the discharge of dredged an fill material are required. Parts of the program would continue to be administered by the Army Corps of Engineers, but the bill provides for the assumption by the States of substantial portions of the permit program.

To facilitate the carrying out o f routine activities, our bill specifically states that permits are not required for such activities as normal farming, silviculture or ranching, some mining and construction activities. The exemption of these activities from permit requirement will greatly simplify the administrative process and reduce the potential redtape burden.

I emphasize, Mr. President, that while silvicultural activities are exempted from permit requirements, this exemption does not extend to clearcutting in eastern mixed hardwood forests. Clearcutting has resulted in extensive damage to the land and pollution of streams where it is practiced. The committee report, therefore, specifies that clearcutting in eastern mixed hardwood forests is not a normal silvicultural activity and thereby is subject to the permit requirements of the act. I personally believe that in those instances...."

From HR Rep. No 94-1107, at 22 (1976) House Public Works and Environment Committee was concerned "...full implementation of the permit program under the new regulations would have a dramatic effect on the overall Corps of Engineers permit program." and the expanded 404 program, per the Corps regulations and court interpretation will make it impossible for effective administration due to the increase workload on the Corps and "discourage the States from exercising their present responsibilities in protecting water and wetland areas." The Committee report stated that environmental protection should be a shared responsibility of the states and the federal government and concluded that discharges from activities addressed by section 404 into non-navigable waters of the US, are more appropriately subject to regulation [by] the states."

Okay, I'm about to switch to photos. Too much to type and while I thought I had time.....

to EPA and left jurisdiction in the Corps of Engineers for dredged and fill in navigable streams-a very limited intention, and selfishly motivated by those who wanted to protect the corps and who ha an interest in protecting dredge and fill operations and wanted it over them.

From: Chemerys, Ruth <Chemerys.Ruth@epa.gov>

Sent: Monday, July 27, 2020 3:36 PM

To: Hurlid, Kathy <Hurlid.Kathy@epa.gov>

Subject: RE: Draft 404(g) preamble sections for review: upfront and background - Mindy questions for you re Rose's draft

As you can see, I wanted to get back to Mindy and decided to hedge on dispute resolution. If you have an idea when you might be able to draft something, or see if Megan can work on it, I can let Mindy know.

Also, Mindy reviewed Roses' draft background sections and there are a few questions for you - when you get a chance.

Ex. 5 Deliberative Process (DP)

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Here are a few questions:

1. Re "In the 1977 Amendments to the CWA, gave States the option of assuming the 404 permit program in certain waters of the State, subject to EPA approval."

Ex. 5 Deliberative Process (DP)

2.

Ex. 5 Deliberative Process (DP)

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There is also a placeholder in the summary for examples of technical fixes, which we can add later.

Ruth

From: Hurlid, Kathy <Hurlid.Kathy@epa.gov>
Sent: Monday, July 27, 2020 3:09 PM
To: Chemerys, Ruth <Chemerys.Ruth@epa.gov>
Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Thanks for not waiting for me! You could end up waiting a while this week. Sorry.

From: Chemerys, Ruth <Chemerys.Ruth@epa.gov>
Sent: Monday, July 27, 2020 3:04 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

^[1] <https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report>.

Cc: Hurlid, Kathy <Hurlid.Kathy@epa.gov>

Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Thanks Mindy. This is helpful.

Ruth

From: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Sent: Monday, July 27, 2020 3:02 PM

To: Chemerys, Ruth <Chemerys.Ruth@epa.gov>

Cc: Hurlid, Kathy <Hurlid.Kathy@epa.gov>

Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Hi Ruth,

In response to your questions,

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I have time this week, so I can take a look at the draft EA to get a feel for direction knowing that it isn't done.

Thanks,
Mindy

Mindy Eisenberg
Associate Director, Oceans, Wetlands & Communities Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4504T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

From: Chemerys, Ruth <Chemerys.Ruth@epa.gov>

Sent: Monday, July 27, 2020 2:03 PM

To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Cc: Hurlid, Kathy <Hurlid.Kathy@epa.gov>

Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Hi Mindy-

I updated slightly to reflect the items sent today, and changed to today's date. Regarding status and questions on a few sections:

Preproposal outreach:

Ex. 5 Deliberative Process (DP)

From: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Sent: Monday, July 27, 2020 8:06 AM

To: Kwok, Rose <Kwok.Rose@epa.gov>; Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Chemerys, Ruth <Chemerys.Ruth@epa.gov>

Subject: RE: Draft 404(g) preamble sections for review: upfront and background

Thanks Rose! I think this is off to a good start. I agreed with your suggestion about moving up the legal background, which I did as well as moving other pieces around to address the narrative arc. This is something Dave is particularly interested in – telling the story. You will also see some bubble comments suggesting building in a little more history in certain places.

Let me know if you want to talk.

Thanks,
Mindy

Mindy Eisenberg
Associate Director, Oceans, Wetlands & Communities Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4504T
Washington, DC 20460

(202) 566-1290
eisenberg.mindy@epa.gov

From: Kwok, Rose <Kwok.Rose@epa.gov>
Sent: Thursday, July 23, 2020 10:40 AM
To: Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Chemerys, Ruth <Chemerys.Ruth@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: Draft 404(g) preamble sections for review: upfront and background

Sorry for the delay – here were the parts that I worked on with some placeholders where things can be added

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